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IN THE

# Supreme Court of the United States

**October Term, 1974**

**No. 74-305**

ANGELO F. CONIGLIO,
*Plaintiff-Petitioner,*

vs.

HIGHWOOD SERVICES, INC., NATIONAL FOOTBALL LEAGUE and PETE ROZELLE,
*Defendants-Respondents.*

## BRIEF FOR DEFENDANT-RESPONDENT HIGHWOOD SERVICES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This Court on October 15, 1974 denied the petition for a writ of certiorari in *Laing v. Minnesota Vikings Football Club, Inc.*, No. 73-1716, ___ U.S. ___ (1974) where the United States Court of Appeals for the Eighth Circuit affirmed the grant of summary judgment dismissing the complaint in a similar class action involving the season ticket policies of the Minnesota Vikings. No reason has been, nor can it be, advanced why the case at bar is to be treated differently than the *Minnesota Vikings* case.

Indeed, in the *Vikings* case only 2,500 tickets out of 47,000 were available on a game-by-game basis, whereas in the case at bar 23,000 tickets out of 46,000 were available on a game-by-game basis.

The Second,[1] Fifth,[2] Sixth[3] and Eighth[4] Circuits have all affirmed summary judgments dismissing the complaint in similar season ticket cases. In addition, an appeal from the granting of summary judgment in the First Circuit[5] was dismissed. All the Courts that have had occasion to concern themselves with the issues raised in season and subscription ticket packages have reached the same result. No conflict exists between Circuits or, indeed, as a result of any District Court decision.[6]

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[1] *Coniglio v. Highwood Services, Inc.*, 495 F. 2d 1286 (2d Cir. 1974). (The case at bar.)

[2] *Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F. 2d 321 (5th Cir. 1974).

[3] *Grossman Development Co. v. Detroit Lions, Inc.*, No. 74-1093, 1974 CCH TRADE CASES ¶ ___, ___F. 2d___ (6th Cir. Sept. 5, 1974).

[4] *Laing v. Minnesota Vikings Football Club, Inc.*, 492 F. 2d 1381 (8th Cir. 1974) *cert. denied*, ___U.S.___(Oct. 15, 1974).

[5] *Pfeiffer v. New England Patriots Football Club, Inc.*, No. 72-1306 (1st Cir. Nov. 1, 1972).

[6] The denial of summary judgment in *Flood v. San Francisco Forty-Niners*, No. C72-1701 (ND Cal. July 9, 1974) is not to the contrary. There the court found that there was a question of fact whether the Oakland Raiders provided competition for the San Francisco Forty-Niners in the Bay area for football fans. In the case at bar the nearest competition is some 189 miles away. (Petitioner's App. 10a, fn. 11)

## Question Presented

Did the Court of Appeals err in affirming the judgment granting respondents' motions for summary judgment which held that the season ticket practices of the Buffalo Bills Football Club, hereinafter referred to as the "Bills" (owned and operated by the respondent Highwood Services, Inc.[7]) did not constitute an illegal tying arrangement where the ticket practices of the Bills had no anti-competitive effect and where half the tickets for the home games of the Bills were available for purchase by persons other than season ticket holders, thus properly concluding in effect than the anti-trust laws were not enacted to guarantee every spectator a seat on the 50-yard line for the home games of the Bills.

## Statement of Case

Coniglio, the petitioner, is a hydraulic engineer employed by the New York State Power Authority (Petitioner's App. 3a) and a football fan who complains of the Bills' ticket practices. The essence of his complaint seems to be that the Bills offered a season ticket package which consisted of tickets to three preseason games and seven regular season games. *No one was forced to buy the package since tickets were also available on a game-by-game basis.* War Memorial Stadium, where the Bills played their home games during the years involved in this action, had a seating capacity of 46,202 (Petitioner's App. 5a, fn. 5) and the most season tickets sold amounted to 23,000 (11a App. Ct. App.).[8] Accordingly, approximately one-half of the seats in the stadium were available at all times to those who desired

[7] Incorrectly referred to in the title as Highwood Services, Inc.

[8] Appendix in Court of Appeals.

to purchase tickets on a game-by-game basis, excluding or including preseason games according to the purchaser's desire. No one was forced to purchase a ticket for a preseason game as a condition to the purchase of a ticket for a regular season game. The team playing professional football located closest to the Buffalo Bills was the Cleveland Browns, some 189 miles away. Based upon these undisputed facts, the District Court held, *inter alia*, (Petitioner's App. 2d) :[9]

> "It is undisputed that at all times mentioned in the complaint tickets for home games of the Buffalo Bills were available for purchase by persons other than season ticket holders and accordingly, the season ticket practices of the Buffalo Bills do not constitute illegal 'tying.' *Pfeiffer v. New England Patriots Football Club, Inc.*, 1973 CCH Trade Cases ¶ 74,267 (D.Mass. 1972); *Driskill v. Dallas Cowboys Football Club, Inc.*, 1973 CCH Trade Cases ¶ 74,544 (N.D. Texas 1973); *Laing v. Minnesota Vikings Football Club, Inc.*, 1973 CCH Trade Cases ¶ 74,601 (D.Minn. 1973). Because the buyer is free to buy either a season ticket or individual game tickets, there is no tying problem even though the seller may offer a package of both season and preseason game tickets. See, *Northern Pacific Ry. v. United States*, 356 U.S. 1, 6 (1958)."

The judgment of the District Court entered upon its decision was affirmed by the Court of Appeals for the Second Circuit, 495 F. 2d 1286, and the petitioner's motions for rehearing and rehearing *in banc* were both denied.

As summarized by Judge Thornberry in *Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F. 2d 321, 322 (5th Cir. 1974), summary judgments have been granted or upheld on appeal on three different theories: (1) that the tying of preseason to regular season tickets has no anti-competitive effect in the tied market; (2) that fans are not in

[9] 1973 CCH TRADE CASES ¶ 74,795 (WDNY 1973).

fact coerced into buying tickets to preseason games (as part of a season ticket package) in order to gain admission to regular season games when tickets are available on a game-by-game basis; and (3) that no tying of one product to another is possible, since there do not exist two different products—preseason and regular season games—but rather only one indivisible product—professional football games. Although the Second Circuit in the case at bar bottomed its decision only upon the first theory, we believe that all three theories bar the petitioner's claim.[10]

## REASONS FOR DENYING THE PETITION

There is no conflict among Circuits for the Court to resolve in this case. On the contrary, the Courts of Appeals for four Circuits have considered the issues raised in these season ticket sale cases, and each Circuit has affirmed a grant of summary judgment for defendants. There is no inconsistency among the decisions of the Courts of Appeals, nor is there any suggestion of a possible source of conflict in any of the decisions. Further, the decision of the Second Circuit in the instant case is fully supported by principles previously established by this Court concerning the terms of the Sherman Act and the elements of private antitrust causes of action.

There is no basic or important question of federal antitrust law presented in this case that should be settled by this Court. The federal courts that have reviewed the

[10] Petitioner's then counsel conceded at the oral argument before the District Court that he could not distinguish the *New England*, *Minnesota* or *Dallas* cases that had at that time been decided either on the facts or on the law. Summary judgment dismissing the complaint had been granted in each of those cases by the District Court at that time.

issues presented, both at the trial and appellate levels, have had no difficulty in determining the established principles to be applied in these season ticket sale cases.

In addition, petitioner's contentions regarding the relevant market were reviewed below on the independent ground that he had completely failed to satisfy the requirements of Fed.R.Civ.P. 56(e) in not raising any genuine issue of material fact requiring a trial. Thus, review of the Second Circuit's holding is not warranted.

As noted, on October 15, 1974, this Court, in *Laing v. Minnesota Vikings Football Club, Inc.*, No. 73-1716, denied a petition for a writ of certiorari to review a decision of the Court of Appeals for the Eighth Circuit that is essentially indistinguishable from the decision of the Second Circuit sought to be reviewed here. The present petition should also be denied.

**A. Failure to show restraint on competition.**

Petitioner argues that this Court should overrule its prior decisions and announce a new rule that would hold that there is no need to show a restraint on competition to state an antitrust cause of action. The same invitation was extended to this Court in *Laing v. Minnesota Vikings Football Club, Inc.*, No. 73-1716, but the invitation was declined when this Court denied certiorari on October 15, 1974. The petitioner advances no argument why the petition should be granted that was not advanced in the *Minnesota Vikings* petition.

Chief Judge Kaufman, writing for the Second Circuit in the case at bar, analyzed in some detail (Petitioner's App. 9a-13a) the reasons why petitioner failed, as a matter of law, to demonstrate an anti-competitive effect by the

sale of season tickets by the Bills. Petitioner has failed to show any fallacy in Judge Kaufman's reasoning and the result reached therefrom.

In *Champion Oil Service Co. v. Sinclair Refining Co.*, 1974 CCH TRADE CASES ¶ 75,217, ____ F. 2d ____ (6th Cir. 1974) the Court held that in order to constitute a violation of the Sherman Act there must be an anti-competitive effect from the complained of activity. The Court relied upon *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940), where this Court held that the Sherman Act does not apply unless there is some form of restraint upon commercial competition in the marketing of goods or services. The purpose of the Act was stated by this Court in that case to be:

> "The end sought [by the Sherman Act] was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services . . ."

Where there is no evidence that a decision to terminate a relationship or for that matter to sell a season ticket package is made for anti-competitive reasons, the complaining party has failed to prove a violation of the Sherman Act. *Cartrade Inc. v. Ford Dealers Advertising Assn.*, 446 F. 2d 289 (9th Cir. 1971), *cert. denied*, 405 U.S. 997 (1972); *Champion Oil Service Co. v. Sinclair Refining Co.*, 1974 CCH TRADE CASES ¶ 75,217, ___ F. 2d ____ (6th Cir. 1974).

Judge Kaufman disposed of Coniglio's attempt to bootstrap his hollow claim of an anti-competitive effect into a triable issue in his decision (Petitioner's App. 12a-13a): "[T]he propriety of summary judgment in this case rests on Coniglio's total failure to demonstrate any adverse effect on competition, actual or potential, an issue perfectly well

suited to objective, statistical analysis. In such instances, summary judgment is properly granted to lower the curtain on costly litigation where it is clear beyond cavil that one side simply has no support for its version of alleged facts. See *Community of Roquefort v. William Faehndrich, Inc.*, 303 F. 2d 494, 498 (2d Cir. 1962)."

The Court then rejected Coniglio's attempt to avoid the lack of a demonstrable anti-competitive impact of the Bills' ticket sales practice by contending that a deleterious effect on competition is not essential to prove a violation of the Sherman Act. The Court then held that neither the cases marshalled by the petitioner nor the plain language of the Act, which speaks specifically of contracts "in restraint or trade or commerce," support the contention that the Act can be violated absent of showing of such restraint. Finally, the Court concluded that the Bills have not used the ticket sales practice to either prevent competition or destroy it and that such practice does not represent an unlawful abuse of its lawful monopoly power.

In the case at bar, Coniglio simply ignores the fact that the antitrust laws are designed to prevent unreasonable restraints on competition. As Justice Black stated in *Northern Pacific Ry. v. United States*, 356 U.S. 1, 4 (1958):

> ". . . the policy unequivocally laid down by the [Sherman] Act is *competition*." (Italics ours)

In *Northern Pacific Ry. v. United States*, 356 U.S. 1, 6 (1958) this Court was concerned with a tying arrangement in which the railroad sold or leased certain land *on the condition* that the grantee or lessee ship over its lines all goods produced or manufactured on the land. Justice Black grounded his opinion on the effect that tying arrangement had on competition. This Court was careful

to use the *per se* label only in conjunction with an analysis of competition and markets stating at 356 U.S. 6:

> "[Tying arrangements] deny competitors free access to the *market* for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in *another market*. At the same time buyers are forced to forego their free choice between *competing* products." (Italics ours)

In *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 498-499 (1969), the proscribed anti-competitive effect was that a division of United States Steel extended credit only on the condition that a buyer also purchase a certain number of prefabricated houses, thereby restraining competition in the housing ("tied" product) market.

As was noted by Judge Dooling in *Shayne v. Madison Square Garden Corp.*, 1974 CCH TRADE CASES ¶ 74,920 (E.D.N.Y. 1973) *appeal dismissed*, 491 F. 2d 397 (2d Cir. 1974), the one factor common to all of those cases which have found illegal tie-in sales:

> ". . . is the visualization of competing suppliers of the tied product or something that adequately substitutes for it . . . But the visualization is inevitably a clear one: there must be an identifiable something which is interchangeable with the tied product and to which the coerced buyer is denied free access and the supplier of which is denied uninhibited access to the coerced buyer."

In the case of the Bills, there is no interchangeable product which the buyer Coniglio has been prevented from obtaining and there is no supplier of a *substitutional* product who has been deprived of the opportunity to sell such product to the buyer Coniglio.

**B. No coercion existed because an abundance of single game tickets were available.**

Since 1966, the Bills have offered to the public season tickets consisting of both preseason and regular season games. A "season ticket" consists of separate tickets to each of the home games to be played by the Bills. The Bills make it possible for such tickets to be obtained by a single purchase prior to the playing of the first game. The purchaser of a "season ticket" pays the same price per ticket to each of the games as does a person who purchases tickets on a game-by-game basis and he witnesses the same events.

In the years involved in this litigation the Bills annually sold between 21,265 and 24,700 season tickets in the stadium seating 46,206. Thus, about one-half of the tickets to the Bills' home games were available for purchase by persons other than season ticket holders.

Furthermore, during the same period a purchaser so desiring could buy tickets to one or more games in any combination he desired, including a combination of regular and preseason games or a combination of regular season games alone. In fact, a substantial number of persons bought at one time tickets to nine or less games consisting of combinations of preseason and regular season games, or only regular season games (82a-83a App. Ct. App.).

The record in this case reveals beyond any question that no purchaser was at any time required to purchase a ticket to a preseason game in order to obtain a ticket to a regular season game. These are the *undisputed* and *uncontested* facts of this case and belie any claim that the Bills engaged in a practice of tie-in sales. The availability of tickets to all games precludes any claim of tie-in sales, let alone a claim of an illegal tie.

Coniglio's case, as a minimum, rests on the proposition that the Bills have violated the antitrust laws by requiring persons to purchase tickets to preseason games in order to acquire tickets to regular season games. If, as here, there was no such requirement, then the complaint was properly dismissed.

A tying arrangement is an agreement by a seller to sell one product ("tying" product) to a buyer only on the condition that the buyer also purchase a distinct and different product ("tied" product), and under certain circumstances such an arrangement is illegal under the antitrust laws. *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958); *Fortner Enterprises Inc. v. United States Steel Corp.*, 394 U.S. 495, 497 (1969).

In *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5-6 (1958), this Court enunciated the oft-cited definition of an illegal tying arrangement:

> "For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but *only on the condition that* the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.[4] Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed.
>
> "[4] Of course, where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price." (Italics ours.)

Our case exactly! The Bills offered the package but the buyer was free to buy any items as he desired. Even Coniglio did so.

In his petition Coniglio sets forth an excerpt from *Northern Pacific, supra*, but studiously omits this Court's footnote 4, *supra*, which constituted an integral part of this

Court's definition of an illegal tying arrangement. The reason for the omission is clear—the availability of tickets to all regular season games means that a Bills fan is free to purchase a season ticket or tickets to only those games he desires to attend, including all of the regular season games. In other words, the buyer is free to take either product by itself and in whatever numbers or on whatever occasion desired.

The essence of an illegal tying arrangement—the sale of one product *only on the condition* that the buyer purchases another distinct product—is wholly absent under the uncontested facts with respect to the Bills' ticket policies.

That the Bills offer tickets to all of the Bills' home games as a package does not violate of the Sherman Act since the Bills also offer tickets to all of their home games on an individual game basis.

This Court has expressly upheld the right of a seller to sell products in a package. In *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 159 (1948), the Court sanctioned the sale of films in blocks as long as the purchaser had the alternative of buying the films on an individual film basis, stating:

> "We do not suggest that films may not be sold in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film."

That language was reaffirmed by this Court in *United States v. Loew's Inc.*, 371 U.S. 38, 55 (1962).

To hold that the Bills' practice of offering tickets in a package constitutes an illegal tying arrangement when tens of thousands of tickets (one-half of them) to all of the Bills' home games have been available prior to the start of

the regular season would mean that manufacturers and retailers could not sell tools by the package, stereo components by the set, razors and blades by the package, or golf clubs by the set, since the retailing of two or more products jointly in and of itself would represent an antitrust violation. Such a result is neither justified by purpose of the antitrust laws to prevent restraints of trade nor warranted by a particular fan's concept of an "ideal" season ticket.

Since an abundance of single game tickets were available for every home game of the Bills, a fact not disputed, the fact that tickets were also offered in a package does not constitute an illegal tie. Accordingly, without more, this point is dispositive of the petition.

**C. Tickets to preseason or regular season games are the same product.**

The Bills have not, and cannot, restrain competition in another product market since it is involved in only one product market: the market for tickets to the Bills' professional football games. The District Court properly concluded, therefore, that with only one product market, the Bills' ticket policies had no anti-competitive effects.

To further sub-divide the product market on the basis of seat location, or into tickets to preseason games and regular season games, would generate a host of insurmountable problems for the Bills and for the courts. As the court in *Pfeiffer v. New England Patriots Football Club, Inc.*, 1973 CCH TRADE CASES ¶ 74,267 (D. Mass. 1972) pointed out:

> "[W]hile recognizing the obvious differences between exhibition and regular season competition, *the product in both cases is professional football*, and any subdivi-

> sion of the market or product would rest on such gossamer and subjective consideration as to be untenable." (Italics ours.)

In a footnote, the District Court in the *Patriots* case indicated the type of problem courts would encounter if the result was otherwise. The footnote reads as follows:

> "For example, how could a court determine objectively whether a regular season game with the Philadelphia Eagles is a more interesting and desirable product than a preseason game against the Dallas Cowboys?"

Another example in a different field of sports is provided by *Shayne v. Madison Square Garden Corp.*, 1974 CCH TRADE CASES ¶ 74,920 (EDNY 1973) *appeal dismissed*, 491 F.2d 397 (2d Cir. 1974) in which the plaintiff alleged that the Garden's six different season ticket plans violated the antitrust laws. The District Court commented upon the inclusion of preseason New York Rangers (hockey) and New York Knicks (basketball) games in the more comprehensive of the Garden's season ticket plans:

> "It must be noted, however, that denominating regular season games as dominants over 'tied' preseason games implicitly recognizes a principle of differentiation of individual game attractiveness that applies as well among regular season games, the attractiveness of any one of which must often be a function of time, league standings, and possession of 'star' performers.
>
> * * *
>
> "The inclusion in the season subscription plans (particularly Plans 4 and 5) of the preseason games hardly seems significant in a 'tied' and 'tying' analysis. If season subscriptions are not themselves to be impugned, to add or to leave out the preseason games hardly seems of any legal moment."

If this petitioner in this class action were to succeed in getting this Court to tailor a season ticket or tickets to suit

his particular preferences and the differing preferences of the various members of the class, this busy Court and other courts may be faced with countless other suits. For example, the next plaintiff or some members of his class may demand that the Bills' regular season game with the Baltimore Colts be excluded from the season tickets because he or they believe that currently the Colts are a poor team or that the game is scheduled for an inconvenient date. Another plaintiff in the League division which includes the Houston Oilers may insist that a regular season game with that team be dropped because of its record of one victory and thirteen defeats. Another plaintiff or another member of the class which he may claim to represent may insist that all regular season games which follow the game in which the Bills, or any team as to which he is a fan, clinches a play-off spot be excluded on the grounds that the results of the games played thereafter will not affect the final standing of his team.[11]

Some plaintiff may claim that regular season Monday night games be excluded and only Sunday afternoon games be included. Perhaps another plaintiff, sharing Coniglio's antipathy toward the National Conference teams, will ask that games with the teams of such Conference be omitted and only games with other teams in the American Conference of the National Football League be included (the Bills, who are in the American Conference, play regular season games and preseason games with teams of both Conferences). Obviously, the product market, which is *professional football*, cannot be subdivided on the basis of particular football games without creating a panoply of problems ill-suited for resolution by the courts.

[11] One of the plaintiff's claimed differences between a preseason game and a regular season game is that a preseason game doesn't affect the standing of the team.

Expanding upon the Courts' illustrations in the *New England Patriots* and *Madison Square Garden* cases, *supra*, who is to say that a preseason game between the New York Jets and the Bills with Joe Namath passing and O. J. Simpson running is less exciting or poorer entertainment than a regular season game between the Houston Oilers and the New Orleans Saints. Likewise, who is to say that a seat at a preseason game between the star-studded Miami Dolphins and the Minnesota Vikings (a replay of the last Super Bowl encounter) is less desirable than a seat at a regular season game between the Baltimore Colts and the New Orleans Saints. Courts do not sit to decide such questions.

Similar problems, even more complex, loom if the product market is attempted to be subdivided on the basis of seat location. For example, if the market is to be subdivided by seat location, which yard line will form the boundary between the subdivided markets—the 40-yard, the 20, or the goal line? Will a 50-yard line seat in the upper recesses of the stadium be included in the same product market as a seat on the 10-yard line at ground level? Some fans prefer the 10-yard line over the 50-yard line[12] on the theory that the play gets harder and more exciting as a team approaches the other team's goal line. In deciding which side of the field to sit on, some fans object to the sun in their eyes, while others like its warmth. Many fans like low level seats where they can observe sideline activities and cheer their heroes or boo the visitors. Still others prefer high level seats where they can see the deployment of the offense and defense and observe the passing game to better advantage. There are some sophisticates who choose end zone

[12] Just as some baseball fans prefer the first base line to the third base line and others prefer to sit behind the catcher.

seats where with binoculars they can more clearly see the different players in their attempts to carry out their various assignments.

Tying arrangements have been condemned by the courts only when the practice affects competition and only when a seller is able to exert his leverage and power in one product market to restrain *competition* in *another* product market. If a court finds that the controversy is over a single product market, then tying is not possible. We submit the single product market here involved is that of tickets to Bills' home games.

This Court formulated the single products doctrine in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 614 (1953):

> "The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second *distinct* commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to *competition* in the 'tied market'." (Italics ours.)

See also, *Kugler v. Aamco Automotive Transmissions, Inc.*, 337 F. Supp. 872, 874 (D.Minn. 1971), *aff'd* 460 F. 2d 1214 (8th Cir. 1972).

## Conclusion

In view of the lack of any anti-competitive effect of the Bills' ticket sales policy, the availability of an abundance of tickets to all Bills' home games and the one product market, it is submitted that the petitioner has failed to state a claim upon which relief can be granted or raise a question of fact upon which the legal issues turn. More importantly, the petitioner has set forth an insufficient basis for the granting of a writ of certiorari and, accordingly, his petition should be denied.

Dated: Buffalo, New York,
October 17, 1974.

Respectfully submitted,

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